State of New York
Commission on Judicial Conduct

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

Determination

BERNARD M. BLOOM,

Surrogate, Kings County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Helaine M. Barnett, Esq.
Honorable Evelyn L. Braun
E. Garrett Cleary, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Juanita Bing Newton
Honorable Eugene W. Salisbury
Barry C. Sample
John J. Sheehy, Esq.
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Jerome Karp for Respondent

The respondent, Bernard M. Bloom, judge of the Surrogate's Court, Kings County, was served with a Formal Written Complaint dated January 11, 1994, alleging that he knowingly gave inaccurate testimony in an attorney disciplinary proceeding involving a court employee. Respondent did not answer the Formal Written Complaint.

On June 9, 1994, the administrator of the Commission, respondent and respondent's counsel entered into an agreed

statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4) and stipulating that the Commission make its determination based on the Formal Written Complaint and the agreed upon facts. The Commission approved the agreed statement by letter dated June 10, 1994.

Both parties submitted memoranda as to sanction. By letter dated July 25, 1994, the Commission offered the parties the opportunity to supplement their memoranda. The administrator submitted additional papers on August 5, 1994, and respondent supplemented his papers in a memorandum dated August 23, 1994, and a letter dated September 9, 1994.

On November 22, 1994, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been judge of the Surrogate's Court, Kings County, since January 1, 1977.

2. Respondent has known Irwin Rosenberg for more than 25 years. Respondent and Mr. Rosenberg were employed simultaneously at one time in the law firm of respondent's late brother. Mr. Rosenberg became a full-time employee of the Surrogate's Court, Kings County, in 1966. From 1979 to 1983, he served as respondent's principal law assistant, and, from 1983 to May 10, 1993, he was chief law assistant.

3. On December 19, 1990, the Grievance Committee for the Second and Eleventh Judicial Districts began a disciplinary proceeding against Mr. Rosenberg for practicing law in state courts without applying for and receiving prior approval from the Chief Administrator of the Courts, as required by the Rules of the Chief Judge, 22 NYCRR 25.40. Mr. Rosenberg was also accused of concealing his involvement in cases in which he acted as a private attorney and other acts of misconduct.

4. On June 17, 1992, respondent testified, pursuant to subpoena, in the disciplinary proceeding as a witness for Mr. Rosenberg. As well as giving favorable character testimony on behalf of Mr. Rosenberg, respondent testified that:

a) he had given Mr. Rosenberg and other court employees permission from "time to time" to appear in uncontested matters in Surrogate's Court;

b) respondent had the sole authority to give his court employees permission to practice in the courts;

c) it was a common practice for employees of respondent's court to practice in the courts in uncontested matters without seeking the permission of the Chief Administrator; and,

d) in granting such permission, respondent is not subject to the Rules of the Chief Judge.

5. At the time that he gave such testimony, respondent:

a) knew that he had never given Mr. Rosenberg permission to practice law in any court;

b) knew that he had never given Mr. Rosenberg explicit permission to act as executor in an estate;

c) knew that he had given permission to only one court employee to act as executor in an estate more than 17 years earlier;

d) had no knowledge that Mr. Rosenberg had handled any case in any court other than as executor in two cases in respondent's court;

e) knew that the Rules of the Chief Judge applied to respondent's court;

f) knew that 22 NYCRR 25.40 bars the practice of law by Surrogate's Court employees unless they have permission of the Chief Administrator of the Courts;

g) knew that he had no authority to give such permission; and,

h) did not know of any instances in which employees of the court had practiced law.

6. Respondent knew at the time that he testified that his statements were inaccurate. Nevertheless, he reiterated these inaccurate statements numerous times during his testimony and failed to correct them.

7. Respondent testified that he would continue to give lawyer-employees of the court permission to handle cases, even though he knew that he had no authority to do so.

8. Respondent gave inaccurate testimony to the grievance committee for the purpose of assisting Mr. Rosenberg's defense of the charges against him.

Supplemental findings:

9. On September 13, 1993, respondent testified during the investigation of his conduct by the Commission. He testified truthfully during this proceeding and acknowledged that his testimony before the grievance committee was, in part, wrong.

10. Respondent must retire from the bench on December 31, 1996, because he will reach the age of 70 in 1996.

11. Respondent apologizes for his actions during the grievance committee hearing.

12. Respondent has contributed his time and efforts to numerous worthy causes during his career.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1 and 100.2, and Canons 1 and 2 of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent was clearly attempting to assist his associate of longstanding by giving the grievance committee inaccurate information that would tend to mitigate Mr. Rosenberg's conduct. Under oath, respondent stated that Mr. Rosenberg, a full-time court employee, had respondent's permission to practice law and that respondent was legally authorized to give such permission in his court, even though he knew that Mr. Rosenberg had never sought or been given such permission and that, in any event, only the Chief Administrator of the Courts was empowered to grant it.

"Such deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." (Matter of Myers v State Commission on Judicial Conduct, 67 NY2d 550, 554).

A review of the law of judicial discipline in this state shows that the courts and this Commission have imposed a variety of sanctions in cases concerning deception by judges, depending on the circumstances and other conduct involved. For example, a judge's testimony in defense of other conduct has been held to necessitate removal when it is not believed, even though the underlying conduct would have resulted in a less severe sanction. (See, e.g., Matter of Perry, 53 AD2d 882 [2d Dept]; Matter of Mossman, 1992 Ann Report of NY Commn on Jud Conduct, at 59, 62). In other cases, judges were censured or admonished, even though they were found to have given testimony lacking in candor. (See, e.g., Matter of MacAffer, 2 Commission Determinations 347; Matter of McGee, 1985 Ann Report of NY Commn

on Jud Conduct, at 176). In some cases, judges have been removed on findings of deception that significantly compounded other misconduct, even though they had not engaged in false swearing. (See, Matter of Greenfeld v State Commission on Judicial Conduct, 71 NY2d 389; Matter of Myers, supra; Matter of White, 1987 Ann Report of NY Commn on Jud Conduct, at 153). However, in a recent case, a judge was censured on a charge that he made a false statement under oath in a grievance committee proceeding. (Matter of Barlaam, unreported, Commn on Jud Conduct, July 27, 1994).

In this case, there are a number of mitigating circumstances which support a sanction less than removal. While obviously misleading and designed to aid Mr. Rosenberg's defense, respondent's statements were largely exaggerations of his own authority. He had expected to give only character testimony when called on Mr. Rosenberg's behalf; his remarks, he now admits, were made from pique and arrogance but were not the result of careful and considered calculation. (See, contra, Matter of Heburn v State Commission on Judicial Conduct, 84 NY2d 168, 171; Matter of Mazzei v State Commission on Judicial Conduct, 81 NY2d 568, 572).

Respondent's action, though clearly serious misconduct, was not motivated by selfish interests. (See, contra, Matter of Heburn, supra; Matter of Mazzei, supra; Matter of Bailey v State Commission on Judicial Conduct, 67 NY2d 61; Matter of Sashin, 1980 Ann Report of NY Commn on Jud Conduct, at 131).

We also note that respondent has been forthcoming, cooperative and contrite in the proceeding before this Commission. (See, Matter of LaBelle v State Commission on Judicial Conduct, 79 NY2d 350, 363; Matter of Rath, 1990 Ann Report of NY Commn on Jud Conduct, at 150, 152). His age and experience on the bench must be taken into account. (See, Matter of Edwards v State Commission on Judicial Conduct, 67 NY2d 153, 155; Matter of Agresta, 1985 Ann Report of NY Commn on Jud Conduct, at 109, 111, accepted, 64 NY2d 327; see also, Matter of Quinn v State Commission on Judicial Conduct, 54 NY2d 386, 395).

"Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances. Indeed, we have indicated that removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment. [Citations omitted]." (Matter of Cunningham v State Commission on Judicial Conduct, 57 NY2d 270, 275). Respondent exhibited extremely poor judgment in attempting to assist Mr. Rosenberg by giving misleading testimony to the grievance committee. In the absence of mitigating circumstances, removal would be appropriate for such conduct. (Matter of Heburn, supra). But, as we recently decided in a markedly similar case (Matter of Barlaam, supra), in the presence of mitigating circumstances, censure is adequate.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Berger and Judge Newton dissent as to sanction only and vote that respondent be removed from office.

Mr. Sheehy was not present.

Ms. Crotty and Mr. Sample were not members of the Commission when the vote in this matter was taken.

CERTIFICATION

It is determined that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: January 20, 1995

Henry T. Berger

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

BERNARD M. BLOOM,

DISSENTING OPINION
BY MR. BERGER,
IN WHICH
JUDGE NEWTON JOINS

Surrogate, Kings County.

In the case law of this state, deception by judges most commonly involves a lack of candor in responding to accusations of other misconduct. The courts and this Commission have treated testimony that "lacks the ring of truth" as an aggravating circumstance, usually resulting in removal or censure. (See, e.g., Matter of Gelfand v State Commission on Judicial Conduct, 70 NY2d 211, 215; Matter of Loper, 1985 Ann Report of NY Commn on Jud Conduct, at 172, 174). The Court of Appeals has cautioned that lack of candor should not be considered aggravating if it "unfairly deprives an investigated Judge of the opportunity to advance a legitimate defense." The Court noted that the severe sanction of removal is reserved for cases in which a judge "gave patently false explanations...despite contrary objective proof." (Matter of Kiley v State Commission on Judicial Conduct, 74 NY2d 364, 370).

In some cases, judges have been charged, as a separate act of misconduct, with giving misleading information under oath. Where sustained, only two such cases have resulted in a sanction less than removal. In Matter of Garvey (1982 Ann Report of NY

Commn on Jud Conduct, at 103), a judge signed his wife's name to an application for a racing license, which he then had notarized by a court employee and filed with a state agency. He was censured on the basis of this and other conduct. In the recent Matter of Barlaam (unreported, Commn on Jud Conduct, July 27, 1994), we censured a judge who misled a grievance committee investigating his conduct as a lawyer. Judge Barlaam had told the committee that he had advised the executor of an estate that the decedent's will had not been admitted to probate, when, in fact, he had said that the matter had been admitted to probate. The determination noted that Judge Barlaam had already been censured by the grievance committee, so there was no reason for the public to perceive that he was going unpunished or that the matter had been suppressed.

Barlaam is one of only five cases in which false swearing by a judge constituted the primary basis for discipline. The other four resulted in the removal of the judges involved. In Matter of Sashin (1980 Ann Report of NY Commn on Jud Conduct, at 131), a judge testified falsely before a grand jury on two occasions. Although he was subsequently convicted of perjury, the Commission found that he should be removed on the basis of the false testimony alone, irrespective of the convictions. "The very essence of judicial office in the administration of justice is corrupted by a judge who lies under oath. The consequent ebb of public confidence in the integrity of the judicial system is immeasurable." (Matter of Sashin, supra, at 134). In Matter of

Bailey v State Commission on Judicial Conduct (67 NY2d 61), a judge was removed after he falsely certified applications for hunting licenses in the names of other people as part of a scheme to increase the number of deer beyond the legal limit that his hunting party could kill. He had been convicted of a misdemeanor. In Matter of Mazzei v State Commission on Judicial Conduct (81 NY2d 568), a judge signed his deceased mother's name to applications for a credit card and requested a user's card in his own name, used the card and then misled investigating bank officials by implying that his mother was alive. Judge Mazzei was removed. "Falsification of documents is inimical to the character required of a Judge." (Matter of Mazzei, supra, at 572). The Court also removed a judge who falsely swore on designating petitions that he had personally witnessed signatures nominating him for re-election, when, in fact, others had collected the signatures. (Matter of Heburn v State Commission on Judicial Conduct, 84 NY2d 168).

I believe that respondent's false testimony more closely resembles the deception of the judges in the Sashin, Bailey, Mazzei and Heburn cases than it does that of Judge Barlaam or Judge Garvey or those whose testimony in their own defense was disbelieved by the Commission or the courts. Respondent intentionally and repeatedly told a series of untruths calculated to mislead the grievance committee and to obstruct its proceeding against Mr. Rosenberg. Unlike Judge Barlaam, respondent testified falsely as to a number of facts, reiterated

the misstatements several times and has not already been disciplined for his improper conduct.

"A judicial officer who has so little regard for...the obligations of a witness...is not a fit person to administer oaths and cannot be trusted to faithfully uphold the laws." (Matter of Heburn, supra, at 171).

There are significant aggravating circumstances in this case. Respondent acknowledges that he knew that he was making inaccurate statements of law and fact. (See, Matter of Heburn, supra). As an experienced lawyer and judge, he should have been especially sensitive to the seriousness of giving false testimony. (Compare, Matter of Bruhn, 1991 Ann Report of NY Commn on Judicial Conduct, at 47, 49). There can be no doubt that he "was conscious of the potential legal ramifications of his actions and...made a concerted effort to conceal the true facts...." (See, Matter of Steinberg v State Commission on Judicial Conduct, 51 NY2d 74, 78[fn]).

Although there are mitigating circumstances, as well, the law of New York has long held that "the giving of false testimony, particularly by a member of the judiciary, is inexcusable. Such conduct on the part of a judicial officer, whose responsibility is to seek out the truth and evaluate the credibility of those who appear before him is not conducive to the efficacy of our judicial process and is destructive of his usefulness on the bench," (Matter of Perry, 53 AD2d 882 [2d Dept]).

I respectfully dissent and vote that the appropriate sanction is removal.

Dated: January 20, 1995

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct